

*United States Court of Appeals
for the Second Circuit*



**SUPPLEMENTAL
BRIEF**

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2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----x

5 UNITED STATES OF AMERICA

6 versus

7 PHILIP STOLLER and MARTIN
FRANK,

8 Defendants.

9 -----x

11 New York, N. Y.

12 December 9, 1974 - 2:15 p.m.

13

14 Before

15 HON. HAROLD R. TYLER, JR.,

16 District Judge.

17 APPEARANCES:

18 PAUL J. CURRAN, Esq.,
United States Attorney for the Southern District
of New York

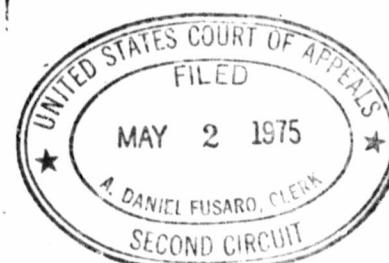
19 IRA LEE SORKIN, Esq.,
Assistant United States Attorney

21 MILTON S. GOULD, Esq.,
Attorney for Defendant Stoller

22 SIDNEY FELDSHUH, Esq.,
Attorney for Defendant Frank

24

25



2 THE CLERK: United States of America versus Philip
3 Stoller and Martin Frank.

4 THE COURT: We will take up the case of Mr. Stoller
5 first.

6 MR. GOULD: Your Honor was kind enough to give us
7 until today to make motions with respect to the trial, and I
8 will try to be as brief as possible with the exposition of it.

9 I have a series of motions, eight in all, and I will
10 only argue to the extent that your Honor indicates any inter-
11 est in the matter, expatiation of the motion.

12 First is that the defendant moves for a judgment of
13 acquittal in that the evidence was insufficient to support a
14 conviction under the conspiracy count, Count 1 of the indict-
15 ment, and the substantive counts, Counts 2 to 10. I will
16 expand in a moment. I thought I would put all these on the
17 record first.

18 Secondly, I move for a judgment of acquittal under
19 Rule 29 on the ground that the pre-trial delay warrants a
20 judgment of acquittal because, not only for the reasons predi-
21 cated on the Marion case which were argued at length before
22 your Honor, but for the additional reason that the introduc-
23 tion of a new theory of fraud by the Government stressed the
24 importance of the witness Moss, the man who died and who was
25 not available.

2 I renew the motion to dismiss the false statement
3 counts, Counts 14 and 16, and I move for a judgment of ac-
4 quittal under Rule 29 on the ground that while the defendants
5 were charged with one crime, I respectfully suggest they were
6 convicted of a different one. I will explain explain each one
7 of those in some more detail in a moment.

8 The second group of motions are motions for a new
9 trial pursuant to Rule 33 of the Federal Rules of Criminal
10 Procedure. We move, defendant Stoller moves that the defend-
11 ants were deprived of due process in that the Government intro-
12 duced into the trial of the case a new theory in fraud in the
13 summation of the assistant United States Attorney and that
14 that theory was furtheramplified in the Court's charge to the
15 jury.

16 The next motion is again for a new trial under Rule
17 33, on the ground that the cumulative effect of the Govern-
18 ment's conduct from the pre-indictment stages through summa-
19 tion was prejudicial to the defendant and tantamount or
20 equivalent to a kind of denial of constitutional due process.

21 Third, I move to set aside the verdict and grant a
22 new trial on the ground that the verdict is contrary to the
23 weight of the evidence and, fourth, I move for a new trial on
24 the ground that the verdict is not supported by substantial
25 evidence.

2 Now, if your Honor will indulge me, if I may refer
3 for a moment to the first motion, the motion for judgment of
4 acquittal on the ground that the evidence was insufficient,
5 I will not argue at length unless your Honor indicates some
6 interest in a point

7 This case, I think, was sent to the jury on the
8 ground that the defendants were statutory underwriters and be-
9 cause they failed to include that information or notice of
10 that fact in the offering circular. It is charged it was by
11 this failure that the public was misled and defrauded. I sug-
12 gest, your Honor, that the testimony of the witnesses clearly
13 indicates that none of them, none of the people who were sup-
14 posed to be defrauded ever saw that offering circular. I refer
15 to the testimony of the witness Parruch at page 1861 in the
16 transcript; the testimony of the witness Hyman, who, on cross-
17 examination at pages 1915 and 1917 in the transcript, testified
18 that he didn't get any of the circulars until after he had
19 received the information from Mr. Stoller, that as a matter of
20 course the firm of DuFont got copies of prospectuses, that
21 they were available to him, but he repeated that he didn't
22 get any information until after he bought the stock.

23 I refer to the testimony of a lady, Eleanor Wein,
24 as she was called there, pages 1939, 1941 in the transcript.
25 She also said that she knew that there were available a number

2 of sources of information, one of those being the prospectus
3 or offering circular, and then she said -- she was asked,
4 "You saw those, did you not, ma'am?" "No", she did not, not
5 for this stock.

6 I respectfully suggest to the Court that the verdict
7 can't be sustained, because the evidence, the relevant evi-
8 dence that was proffered showed beyond any question that the
9 jury could not find or infer beyond a reasonable doubt that
10 the defendants were guilty.

11 There was no proof that any of the witnesses whose
12 purchases are claimed to support any of the substantive counts
13 saw the offering circular, which it is suggested misled them.

14 On this point, I direct your Honor's attention to
15 Curley against the United States, 160 Fed. 2d 229, in the
16 District of Columbia, where I think the Court delineates cer-
17 tain rules for application here, the Second Circuit cases on
18 which we rely; I gloss over the Feinberg, United States
19 against Feinberg, 140 Fed. 2d 592; Malillo indicates that
20 Feinberg has lost some of its validity, and I think that it
21 comes down to the question here on this point whether in ac-
22 cordance with the lines indicated, United States against
23 Lefkowitz, 284 Fed. 2d 310, a 1960 case in the Second Circuit
24 -- the question whether taking all the evidence this was
25 substantially enough to establish a case from which the jury

2 may infer guilt beyond a reasonable doubt.

3 Now, with respect to the second motion, the second
4 motion is that a new theory of fraud was brought up, evoked
5 in the summation and, with all respect, amplified in the
6 Court's charge to the jury, which reinforces the importance of
7 the testimony of the witness Moss.

8 Your Honor will recall that in the course of the
9 trial the conventional motion based on United States against
10 Marion was argued at length. Your Honor denied that motion,
11 and, of course, the motion was posited almost entirely on the
12 unavailability of the witness Moss.

13 I suggest that the proof in this case particularly
14 not only the proof; the summation of the Government and the
15 Court's charge, places a new importance on the presence of
16 Moss. Your Honor will recall that in your charge to the
17 jury you discussed at great length the law which governs
18 underwriters and the failure to disclose underwriters in the
19 offering circular.

20 I don't think it is possible to view this case in
21 its entirety without reaching the conclusion that that part of
22 the summation which was addressed to that subject and that
23 part of your Honor's charge which was addressed to that sub-
24 ject had a very important effect on the minds of the jurors.

25 Now, I respectfully suggest that that was a new

2 theory of fraud, that it was posited after the completion of
3 the summations for the first time and that it emphasized the
4 importance of Moss.

5 Your Honor will recall that the testimony in this
6 case was that Moss, as president of Training-With-the-Pros,
7 Inc., was pretty much in control of things. He was an essential
8 if not the primary personality in the initial offering of the
9 Training stock to the public. There can be no question that
10 as to the offering circular he played a very important part.
11 He was, of course, a co-conspirator here.

12 Without rehashing all of the evidence, your Honor
13 will recall that in the opening statement of the Government,
14 emphasis was placed on the relationship between Moss and
15 D'Onofrio. D'Onofrio testified to conversations about the
16 offering circular with several people, Miss Hertzfeld, Fink,
17 Moss, as he put it, and I think it is obvious from the record
18 of the trial that Moss' position with respect to the under-
19 writing and the offering circular was a major one, probably
20 the most important one.

21 Now, without burdening the Court with a rehash of
22 everything that I said in the more conventional aspects of
23 the Marion motion in the course of the trial, I think that it
24 has to be considered when we moved for -- on the basis of
25 Marion to dismiss in the early part of this trial, we did

2 not understand, nor could we have known how important the
3 testimony of Moss would be, because we could not have antici-
4 pated the theory upon which this case did finally go to the
5 jury. It is clear, I think, that the delay in bringing the
6 indictment and in bringing the defendants to trial becomes
7 especially prejudicial to the defendant Stoller, because your
8 Honor will recall that in the testimony before the SEC on
9 June 20, 1969, Stoller gave testimony, gave information which
10 would have at least substantiated an indictment at that time
11 under the provisions of Section 5 of the 1933 Act.

12 The SEC, in 1970, after completing the investigation
13 of Training, filed a notice of motion in an administrative
14 proceeding, File Number 3-2430, whih I have here and which I
15 will be glad to hand up to your Honor for consideration.

16 Now, in that notice of motion. the SEC clearly in-
17 dicates that it had evidence at that time, in 1969, that the
18 offering circular failed to disclose the existence of under-
19 writers. The notice states that the notification and the
20 offering circular failed to disclose the method by which the
21 securities in question were to be offered, of course as re-
22 quired by Section 5 of Schedule A of Regulation 1, and this
23 is their language: " . . . whereby a substantial portion of
24 the securities would be offered by the issuer to a small group
25 of persons who purchased from the issuer with a view towards

2 distribution, thereby making them underwriters," then reciting
3 the section for definition of a statutory underwriter as
4 contained in the 1933 Act.

5 In other words, in 1969, by its own statement, the
6 Securities & Exchange Commission was ready to go with a Section
7 5 case, to wit, a case based on the omission from the offering
8 circular of the identity of the defendant Stoller as a
9 statutory underwriter. I respectfully suggest that that puts
10 a different light on the applicability of Marion to the case
11 at bar.

12 In that same notice they use the language, "The
13 issuer failed to include in its offering circular" -- again
14 as required by Paragraph 5 and so on -- "a description of the
15 method by which the securities were to be offered," and if
16 the offering was to be made by -- this is their language,
17 " . . . and if the offering was to be made by or through
18 underwriters, the name and address of each underwriter and the
19 amount of participation of each such underwriter."

20 In other words, in 1969, the Securities & Exchange
21 Commission is saying in effect, "You, Stoller, were an under-
22 writer; your identity as such, your function and your respons-
23 ability as such should have been set forth in the offering
24 circular."

25 Now, I find it very hard to see -- I find it very

2 hard to concede to anybody that that was not one of the basic
3 theories on which this case was presented to the jury.

4 Next, the third motion, I simply want to reiterate
5 and reaffirm for your Honor all of the arguments that were
6 made at the trial with respect to the motion for an acquittal
7 on Counts 14 and 16. I want to be sure that the record in-
8 corporates that. I see no purpose in arguing that at length,
9 nor do I see any purpose in rearguing now -- and I think we
10 argued adequately -- I simply want the record to be clear
11 on it -- the motion that the defendants were charged with
12 fraud in that they conspired to and did manipulate the stock
13 of Training, but that they were convicted of being underwriters
14 and defrauding the public by failing to disclose those facts
15 in the offering circular.

16 Now, those are the four motions which are addressed
17 to the Court pursuant to Rule 29 for judgment of acquittal.

18 With respect to the motions under Rule 33, I
19 respectfully argue to this Court that Stoller was deprived of
20 due process in that the Government in its summation set forth
21 a new theory of fraud, and, with all respect, I urge upon the
22 Court that that problem, the problem created by the advance-
23 ment of that new, new in the chronological sense and new in
24 the intrinsic sense, that new theory and the consequences of
25 it were exacerbated by the charge that the Court made to the

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2 jury.

3 I tell your Honor with all sincerity that I was
4 completely surprised by the fact that once the summations
5 started, the theory of the Government's case seemed to be a
6 violation of Section 5, a failure to disclose that Stoller was
7 an underwriter. There wasn't very much that I could do about
8 it at that point except to voice the objection that I did
9 voice, and then when your Honor -- again, most respectfully --
10 gave expression to that in the charge, the only thing that
11 was available to an advocate at that time, I excepted to it,
12 and that exception is spread at length on this record.

13 But I do point out to your Honor that it was not
14 until the Government's closing argument that this different
15 theory of fraud emerged in this case. It was intimated by Mr.
16 Sorkin in his argument that the use of nominees to purchase
17 the five thousand shares of Training which would be attributed
18 to the defendant Stoller, that the use of those nominees to
19 purchase that stock was illegal and should have been disclosed.

20 Those are his words. Your Honor will find that at
21 page 3391 of the transcript.

22 Well, indeed, it should have been disclosed, and,
23 indeed, the defendants have been punished for the failure to
24 disclose it, if that was the thrust, the gravamen, the mean-
25 ing of the charge in this case.

2 But your Honor will not find that in the indictment.
3 Mr. Sorkin said that the use of nominees in this
4 particular case, based upon the testimony that you heard,
5 would have been perfectly legal if Mr. Stoller, Mr. D'Onofrio
6 and Mr. Allen had used nominees to take a thousand shares in
7 the offering, a thousand shares each, not five thousand
8 shares.

9 I don't propose to read excerpts from the summation.
10 I will remind your Honor that you picked up this thought in
11 the charge. I address your attention to that portion of the
12 charge which is reproduced at pages 3552 and 3558 of the
13 transcript, inwhcih you said to the jury, "Stoller, Allen and
14 D'Onofrio should have been listed as underwriters in the
15 offering circular, that in actuality they were statutory --
16 they might have been statutory underwriters, and that fact
17 should have been disclosed in the offering circular."

18 The Government goes further -- I don't mean that
19 your Honor said it as a positive statement. I mean that your
20 Honor said it as expository of the Government's position.
21 Your Honor then stated, "The Government goes further and
22 argues that it may well have been material and that they would
23 seek to persuade you that it was material for not only these
24 men to identify themselves in the offering circular as under-
25 writers but would point out that they were taking the 14,900

2 shares.

3 At another point in the charge, your Honor said
4 that the jury should keep in mind that in a Regulation A stock
5 offering, such as was implemented here in respect to Training-
6 with-the-Pros, the offering circular should, under SEC regula-
7 tions disclose the names of underwriters, and if it is a fact
8 in your judgment that Stoller, Allen and D'Onofrio were under-
9 writers, that would make the offering circular misleading . . .
10 and so on.

11 I don't think I have to belabor this very much more.
12 Your Honor will recall that there was a specific objection,
13 maybe even a violent objection, for which I apologize, to that
14 portion of the charge which is reproduced at page 3597. I
15 submit now that the only fraud that we find alleged in the
16 indictment is fraud with respect to a manipulative scheme,
17 that there isn't a suggestion of the kind of fraud that is
18 treated as part of Section 5 of Regulation A, or any of the
19 regulations. Nevertheless, the case went to the jury on that
20 theory, and I must urge that --

21 THE COURT: I am sorry. I dropped that last point.
22 There is no law to this effect, you say? No regulation --

23 MR. GOULD: Oh, there is a good lot.

24 THE COURT: I didn't understand you.

25 MR. GOULD: Let me try to explain it. Forgive me.

2 You have an indictment here which in its essence charges the
3 defendants --

4 THE COURT: No, no. I understand the basic argu-
5 ment. This last statement you made lost me, though.

6 MR. GOULD: I say that these men, that this case
7 went to the jury as if there were a charge of violating
8 Section 5 of the 1933 Act.

9 THE COURT: Oh, well. I am sorry. I should not
10 have interrupted. You have said that a number of times, at
11 the trial and here. I thought you said something else. I
12 beg your pardon.

13 MR. GOULD: No. I think that is the substance of my
14 point, your Honor. If I said something different --

15 THE COURT: I misheard. I am sorry.

16 MR. GOULD: I misspoke. I was simply making the
17 point that the only fraud alleged in the indictment is fraud
18 under the manipulation section, not under Section 5.

19 Now, as to the background of my client, my indig-
20 nation about the divergence of the proof in the allegations of
21 the indictment, I simply want to remind your Honor that the
22 only mention of an underwriting in the indictment is an
23 allusion to it in Paragraph 5(c) of Count 1, and that is a
24 purely factual allusion. There is nothing substantive about
25 it. They don't say they were under records. They don't

2 suggest they took part in it. There is no mention of it --

3 THE COURT: In any event, I have heard all of this
4 before, and I don't know why we keep repeating it. I get your
5 point.

6 Now, what else --

7 MR. GOULD: Very well.

8 THE COURT: What else have you got?

9 MR. GOULD: Now, your Honor will recall, of course,
10 that ever attempt was made here to smoke out the theories on
11 which the Government was proceeding, and we did get bills of
12 particulars, and you will not find in the bills of particulars
13 any more than in the indictment the substantive basis for this
14 Section 5 theory.

15 I don't want to bore your Honor with repetitions of
16 what we have said before. If your Honor is interested in any
17 expansion of a point, I think it would be far better to do it
18 in writing. I gather your Honor doesn't want extension argu-
19 ment on the point.

20 THE COURT: No. Again, if this were brand new, I
21 might think otherwise, but, you know, you made this point
22 very vividly a number of times when we were together at the
23 trial.

24 MR. GOULD: I have no desire to prolong it, your
25 Honor. There are other things I could say, but I am only

2 concerned at the moment with making sure that before your
3 Honor disposes of it I have said whatever should be said in
4 considering the matter.

5 Now, with respect to the second motion for a new
6 trial, the --

7 THE COURT: Wait a minute. The second motion for a
8 new trial? I thought we had long since passed this. We have
9 been going on forever here now. Wait a minute. You are
10 really confusing me. The second motion for a new trial?

11 MR. GOULD: Your Honor, I tried to explain at the out-
12 set of my argument that I had an aggregate of eight motions.

13 THE COURT: And we are only up to two now?

14 MR. GOULD: No, sir.

15 THE COURT: For Heaven's sakes! I am going to have
16 to take time out to put this over until later this afternoon.
17 We have got some lawyers waiting here. This seems to me to
18 be a little unfair to the Government and the Court, to put
19 us through all this, particularly when I have heard most of it
20 before, if not all of it.

21 MR. GOULD: I am not going to --

22 THE COURT: You say the second motion for a new
23 trial. That throws me off completely.

24 MR. GOULD: Your Honor, when I started I explained
25 that there were four motions based on Rule 29 and there were

2 four motions based on Rule 33.

3 THE COURT: If we are going on at this length, I am
4 going to postpone this until later this afternoon. I am going
5 to hear some other lawyers, because I don't want them sitting
6 around and listening to all of this.

7 Have you heard all of this before, Mr. Sorkin? Did
8 they give you any notice of this?

9 MR. SORKIN: Your Honor, I had a telephone conversa-
10 tion yesterday with Mr. Allenstein, in which he very briefly
11 gave me six areas for either a new trial or for judgment of
12 acquittal. I jotted them down and repeated to him the par-
13 ticular points. All I had was, theory of fraud not anticipated,
14 case went to the jury on a contention never revealed, and
15 that's all I had.

16 THE COURT: Well, Mr. Gould, I don't want to cut
17 you off, but this seems like we are going on until midnight,
18 and I would like to get these other lawyers out. They have a
19 right to be heard. I have got a set of motion papers as
20 thick as my fist this morning, at twelve noon, rather, from
21 the defendant Frank. I specifically invited oral motions, but
22 I also said that the Government should be apprised sufficient-
23 ly in advance, and if I had ever expected to be treated like
24 this I never would have been so generous, I am frank to say.
25 This is outrageous, for us to be put in a position where we

2 are going to go on and on and on and on and on and on some
3 more.

4 So I think I am going to have to ask you to inter-
5 rupt, and I am going to hear my other motions.

6 MR. SORKIN: Your Honor, I would point out to the
7 Court that I received Mr. Frank's, but I am prepared to argue
8 against the motion that I think the Government is prepared,
9 we have heard most of them before, and I have had the oppor-
10 tunity in the last hour and a half to see Mr. Frank's motions,
11 and I am prepared to argue against those.

12 THE COURT: Yes. Well, I unfortunately had some time
13 since twelve noon to read some of the papers, too, but what I
14 am concerned about now is, I think we are just winding down.
15 We haven't even gotten into second gear here, and if I had
16 ever known this, I would have scheduled this at a different
17 time. I never expected this, frankly.

18 I am sorry, Mr. Gould.

19 MR. GOULD: I think the vice lies perhaps on our
20 side; in fact, that your Honor asked that these motions --
21 or suggested that these motions be made orally.

22 THE COURT: This has been my consistent practice for
23 years, but I have never had a situation arise like this where
24 the Government and the Court weren't allowed to have some warn-
25 ing as to what was going to happen.

2 Now, I am not saying this in criticism. I am just
3 making the observation. I never expected an outpouring like
4 this, particularly since I was present, you know, during the
5 trial.

6 I don't know why we have to delineate all this stuff
7 that I have heard before, in any event. With you, apparently,
8 there is some importance to explicating the matters with con-
9 siderable detail, and I suppose I have to accept that.

10 MR. GOULD: I am sure that your Honor understands
11 that in view of the insistence of appellate courts on a clear
12 explication on points which are urged up there and a demon-
13 stration that they were urged below, it would be reckless
14 advocacy on the part of a lawyer of my experience simply to
15 make them in a perfunctory way.

16 THE COURT: I am not arguing on that. I just feel,
17 myself, that you have made the record amply clear, and if I
18 understand -- well, in any case, I am not here to cut you off
19 or argue with you. I just think it is only fair, if I had
20 ever known this, I never would have scheduled this or these
21 other motions. In all my experience I have never heard any-
22 thing like this in a case of this kind or any other kind.

23 So, if you will just be patient with me, we will
24 hear the other motions and get back to this.

25 (Recess, during which other matters were heard.)

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2 THE COURT: Now, Mr. Gould, can we repair to where
3 you were so rudely interrupted by me? You were turning to
4 the second motion --

5 MR. GOULD: I think that perhaps I did not make
6 clear at the outset of my argument to your Honor what the
7 scheme of this argument was. I have addressed to your Honor
8 four motions under Rule 29 which I have argued as fully as I
9 intend to, and I think it would be a waste of time to say any-
10 thing more about it.

11 I have also addressed to your Honor four motions
12 which I thought I had carefully designated as being made under
13 Rule 33. On the first of them I have said everything that
14 I think is necessary to say about them. The second I will not
15 argue at length. I respectfully urge upon your Honor that
16 the Government's conduct in this case from the pre-indictment
17 stage through summation amounted to a denial of due process,
18 and I think that on that ground we are entitled to a new
19 trial.

20 I will not make any more unwelcome arguments about
21 the point. I think that it boils down to the method of
22 handling the witnesses, the quality of the witnesses, the
23 concessions about changes in testimony, the failure on the
24 part of a Government whose primary objective is to get the
25 truth before the Court and the jury, to ignore the existence

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2 of the witnesses fixed, for example, the participation of the
3 Government in the preparation of the witnesses and what was
4 said to us on that subject during cross-examination.

5 In the summation, Mr. Sorkin made certain references
6 with respect to the failure of defense counsel to cross-examine
7 certain prosecution witnesses, which I think was unfair, mis-
8 leading and I think was a tactic calculated to place in the
9 minds of the jurors the false impression that it was the
10 obligation of the defense literally to disprove every part of
11 the prosecution's case.

12 References to the associations among certain of the
13 defendants with certain people, and -- well, I think that sum-
14 marizes it pretty well. I think it unnecessary to argue at
15 length with respect to the third aspect of that group of mo-
16 tions that the verdict was contrary to the weight of the evi-
17 dence, and the fourth, that it was not supported by substan-
18 tial evidence.

19 I think that summarizes the motions sufficiently, and
20 I have concluded with respect to the motions, your Honor.

21 THE COURT: All right, Mr. Gould.

22 MR. GOULD: I ask your Honor with respect to the
23 motions either to take as exhibits in the record of this case
24 or to take judicial notice of the two orders to which I re-
25 ferred earlier, the two documents, first of all, the notice of

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2 motion in Training-with-the Pros, dated August 19, 1970, and
3 the order temporarily suspending exemption from Training-with-
4 the-Pros dated June 17, 1970, and I ask that they be made
5 part of the record for the purposes of the motion, your Honor.

6 THE COURT: All right.

7 MR. GOULD: May I hand them up, your Honor? I
8 think it is probably better if they are handed up rather than
9 just treated as a matter of judicial notice. They are public
10 documents (handing).

11 THE COURT: Yes. I will include them in the case
12 file as part of the record.

13 Now, Mr. Sorkin.

14 MR. SORKIN: Yes, your Honor.

15 THE COURT: What care you to say?

16 MR. SORKIN: Well, your Honor --

17 THE COURT: I might help you by saying that there
18 are only two things that really interest me so far as real
19 comment from the Government is concerned. One is that this
20 argument that since no witnesses appeared at the trial who
21 actually testified in so many words or in substance that they
22 had read the offering circular before they dealt in Training-
23 with-the-Pros that this means the indictment should be dis-
24 missed.

25 MR. SORKIN: I will address myself to that very

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2 briefly, your Honor, because I think it only necessitates a
3 brief comment.

4 Mr. Gould, in arguing for Mr. Stoller, the defendant,
5 lumped together all the substantive counts, 2 through
6 10. I think it is clear, your Honor, that 2 charges something
7 quite different. It charges a violation of 77(q)(a), which is
8 fraud in the offer and sale of the securities, in this case
9 Training-with-the-Pros.

10 3 through 6 charge a violation of 78(j)(b), which
11 we all call 10b-5, and it is clear, your Honor, that with re-
12 spect to 3 through 6 and 7 through 10, which are the mail
13 fraud counts, there doesn't have to be any reliance by the
14 victims, to the effect if they did not see an offering circu-
15 lar, because it does not charge -- the indictment does not
16 charge in 3 through 10 that there was fraud in the offer of
17 stock. It was fraud in connection with the purchase and sale.

18 I think it is clear from the testimony of Wein,
19 Deetjen and Hyman that in their conversations with Messrs
20 Stoller and Allen there were gross omissions of material facts,
21 to wit -- and I could run through this, your Honor; it would
22 take as long as it did to present the evidence -- that there
23 was a fraudulent offering, that nominees were used, that
24 stock was being placed overseas and so forth and so on, and
25 that there was to be a rescue of Bonavia and Weissinger, and

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2 that the entire purpose of speaking to Wein, Hyman and Baruch,
3 so that they would put their customers in, was in effect to
4 raise the price of the stock so that the stock would be higher
5 than what Bonavia and Weissinger would sell at.

6 There were omissions of material fact in those con-
7 versations, and it's quite different from what Mr. Gould
8 argued. I think that should dispose of the first, your Honor.

9 Well, then, the other thing is, the claim has been
10 made at trial, as almost all of these arguments, as I see it,
11 were made at trial, there is the argument again that somehow
12 it was not until the summation that the defense understood
13 that the Government would contend and the Court would charge
14 on the question of whether or not the defendants Stoller,
15 Allen and D'Onofrio were statutory underwriters and that this
16 fact should have been disclosed.

17 Your Honor, I find that really to be shocking, be-
18 cause this argument was made after the Government's case, and
19 if I can direct your Honor's attention to the transcript, where
20 your Honor expressly asked the Government to please comment
21 on the substance of Count 2, and if I may, your Honor, direct
22 the Court's attention to that -- I have it here, if your Honor
23 will bear with me just one moment.

24 At the end of the Government's case, your Honor --
25 and I am looking at page -- forgive me, your Honor; I just was

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2 unprepared for this argument; I didn't catalog it.

3 THE COURT: Well, if you are trying to --

4 MR. SORKIN: In any event, right after the Govern-
5 ment's case, your Honor, the same argument was raised, and
6 we specifically pointed out to the Court that the substance
7 of Count 2 was that Stoller, Allen and D'Onofrio were under-
8 writers. We clearly stated that for the record. Right after
9 the Government's case. And I think I am surprised that coun-
10 sel says he was surprised at summation, because the very first
11 witness, your Honor, was Ruth Appleton, where we got into a
12 colloquy as to whether she could comment on what an underwriter
13 is, and your Honor said that it was the function of the Court
14 to describe what an underwriter was, and your Honor would do
15 that at an appropriate time in the charge.

16 THE COURT: All right.

17 MR. SORKIN: And I think that should dispose of it.
18 I am attempting to find in the transcript where I referred to
19 that, but I assure you I did read it, and this was brought up
20 at the end of the Government's case, and we specifically
21 enumerated the substance of Count 2 of the indictment, what
22 our theory was and what we had charged, what the grand jury
23 had charged.

24 Your Honor, I call the Court's attention, at page
25 2219, the Court asked me, "What does Count 2 really have to do

2 with Martin Frank, seriously?"

3 Then, on page 2219 and 2220, I am quoting at line
4 20: "It is our position with respect to Count Number 2 -- and
5 I think it is clear under the law -- that D'Onofrio, Stoller,
6 Allen were underwriters. It was never disclosed in the offer-
7 ing circular. At Mr. Frank's instructions they were told how
8 to avoid being disclosed in the offering circular use of
9 nominees."

10 And that runs, your Honor, from page 2219 through
11 page 2221, addressing itself right to the very argument that
12 Mr. Gould now raises.

13 THE COURT: In other words, you are really basing
14 this, as I always understood it, that this was part of the
15 scheme and artifice to defraud, to purposely fail to dis-
16 close the underwriter status of the three men.

17 MR. SORKIN: Clearly, your Honor.

18 And I point out for the record that not only are we
19 talking about failure to disclose the underwriter status but
20 failure to disclose in the offering circular the entire scheme
21 that was plotted out by the defendants and co-conspirators,
22 to the effect that they were going to use nominees, they were
23 going to take down over one third of the issue. This has
24 nothing to do with Section 5. Section 5 doesn't charge the
25 fraudulent offering. 17(a) charges a fraudulent offering, and

2 that is what they were charged with in Count Number 2.

3 I might add, your Honor, 17(a) specifically refers
4 to scheme, device and artifice, and, as your Honor well knows,
5 it refers to omissions of material facts, and 10b --

6 THE COURT: Now, is there anything else specifically
7 you want to comment about?

8 MR. SORKIN: Well, I think that touches just about
9 everything, including the argument raised as to the necessity
10 of having Moss.

11 Again I point out for the record that Moss was avail-
12 able to the defendants, and no effort was made to depose Mr.
13 Moss. They knew in fact almost at the time that the Govern-
14 ment knew that he was ill and could not at the very least ap-
15 pear for trial, and no effort was made to do so.

16 While Moss was alive, I point out --

17 THE COURT: Of course, no one has ever been able to
18 assure me that Moss would have been helpful at all to the de-
19 fendants.

20 MR. SORKIN: Well, in that connection, your Honor,
21 I might point out, as I pointed out at trial, that if what
22 the defendants are now arguing is that this is a -- the theory
23 of the Government's case was a fraudulent offering that cer-
24 tainly material omissions were made in the offering circular,
25 Moss' own testimony specifically refers to five people, one

2 of whom was James Feeney, the other was Richard Kirschbaum,
3 and I believe three others who he claimed helped him in the
4 offering. These people were all available to the defendants.
5 Indeed, Mr. Feeney was called as a Government witness. I
6 think Mr. Feldshuh raised this. Mr. Feldshuh had the opportu-
7 nity to cross-examine Mr. Feeney on that, and I don't believe
8 anything was done.

9 I also point out, your Honor -- and I don't think
10 there is any disagreement on this -- Moss was never, ever pre-
11 sent, based on all the evidence, both the Government's case
12 and the defense case, at any of the crucial meetings, meetings
13 with Messrs Frank, Stoller, D'Onofrio and Allen in November of
14 1968, in the summer of 1968, in Switzerland and so forth.

15 So I, quite frankly, don't see, for the many reasons
16 already mentioned at trial, how Moss could have been of any
17 value, assuming he was telling the truth when he testified at
18 the SEC.

19 With respect to Mr. Gould's argument, your Honor,
20 that the SEC was interested in an undisclosed underwriter, I
21 don't think the SEC knew, through no fault of their own, of
22 the involvement of the others in the underwriting of the stock,
23 and that was to wait for some four and a half years later,
24 until a grand jury had sufficient evidence to inquire into the
25 offer.

2 THE COURT: All right. Anything else?

3 MR. SORKIN: No, your Honor. I don't have anything
4 else to add. I really should comment about the second motion,
5 namely, the Government's conduct amounting to a denial of due
6 process, but I don't think --

7 THE COURT: It seems to me we spent a great deal of
8 time trying that out before the jury.

9 MR. SORKIN: Yes; I don't think at this point there
10 is any need to go into it any further, particularly since it
11 has already been litigated sufficiently.

12 I have nothing else to add in response to Mr. Gould's
13 motions.

14 THE COURT: All right.

15 Well, Mr. Gould, I must say that I am constrained to
16 deny Mr. Stoller's motions heretofore made. Some have been
17 made before today, some not, but I deny them on the merits.

18 Now, we want to turn to the sentencing issue.

19 MR. GOULD: Yes, your Honor.

20 THE COURT: Before we do, perhaps we ought to ask
21 Mr. Sorkin -- I did receive a memorandum from the Government,
22 which I guess you did, too --

23 MR. GOULD: We have seen it, too, your Honor.

24 THE COURT: I must say I was a little taken aback,
25 because there was a great deal of evidence recited which I

2 thought I was aware of, but in any event, is there anything you
3 want to comment about that or add to that, Mr. Sorkin?

4 MR. SORKIN: I don't think so, your Honor. I think
5 the sentencing memorandum more than adequately states the
6 Government's position in this case, and, of course, your
7 Honor was present at the trial and there is nothing else we
8 really could add.

9 THE COURT: All right.

10 Mr. Gould?

11 MR. GOULD: Well, if your Honor pleases, I am a lit-
12 tle concerned about these sentencing memoranda, the practice
13 of the sentencing memorandum. I understand it to be the
14 Government's professed policy that it doesn't make recommend-
15 ations with respect to sentence, and it is not my business,
16 whether that is a good policy or a bad policy. But I am con-
17 cerned when the Government presents a memorandum in connection
18 with a sentence where it suggests that the Government has
19 knowledge of other offenses, that the defendant is very gener-
20 ally a very bad man, who is mixed up in other things.

21 There isn't any way in which we can address our-
22 selves to that. If we were to say, "Well, let's see what the
23 facts are," I suppose we will find ourselves in a position
24 where we would be making concessions that could be used
25 against him in other cases.

2 I don't know what the purpose of these memoranda
3 is. I doubt very much if your Honor's mind is going to be
4 affected by anything contained in a memorandum of that kind,
5 because I think that your Honor, like most men who have grown
6 up in a judicial and legal system, is probably far more sensi-
7 tive to evidence than to allegations, and I won't say anything
8 more than that.

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9 Certainly, in a case where we had some five weeks
10 of trial, and also, as I say, I share your puzzlement here,
11 because so much of this memo to me is nothing but a rehash of
12 what we heard, one way or another, during the trial, and so
13 for that reason I am inclined to share your view.

14 Also -- and I don't mean to criticize either your
15 office or Mr. Stoller for this -- the pre-sentence report in
16 this case is of negligible value in this case except the
17 typical pedigree information, because of the policy which Mr.
18 Stoller adopted, on the advice of counsel, vis-a-vis the
19 probation office.

20 MR. COULD: I think on that point, your Honor, per-
21 haps I should address myself to it. I think they were forced
22 into what may be a very unpopular attitude. You see, we
23 have been informed that there are certain income tax cases --

24 THE COURT: That's right, and I am aware of that,
25 and therefore I meant what I said. I say this with no

2 criticism of either you or Mr. Stoller. I understand that.

3 MR. GOULD: You know, I am at a loss as to how I
4 could make a useful contribution to your Honor's task of impos-
5 ing sentence on the man without giving away all his rights in
6 what looks to be another criminal case.

7 THE COURT: Fair enough. I don't quarrel with that
8 at all. However, again, I am trying to say that it is prob-
9 ably of not any serious moment here, simply because we had
10 such a detailed and somewhat protracted trial, and I myself
11 feel that that is perhaps more important, in any event, than
12 any further information that might --

13 MR. GOULD: Let me, then, your Honor, say a few
14 things that I want to say about the defendant and about the
15 task of the Court in imposing sentence.

16 I am not so naive as to think that any oratory on my
17 part at this stage of this proceeding could affect your
18 Honor's experienced judgment with respect to the kind of sen-
19 tence that is required here. I assume that quite properly
20 your Honor comes into this courtroom having studied everything
21 that is available on the subject, everything that is relevant
22 to the subject, with a pretty well informed idea of what
23 should be done.

24 I would be amazed if a Judge with the experience
25 that this Judge has did not do it that way, and I don't be-

2 lieve that any sentence is going to change by anything that a
3 lawyer says in a courtroom. I simply want to suggest to your
4 Honor, though, that this is an unusual type of defendant in a
5 criminal case in that, to my knowledge, and I think demonstrab-
6 ly he has exception gifts. I think he has it within him to be
7 a useful member of society. I think he has it in him perhaps
8 to be a very exceptional man, and I would hope and urge upon
9 the Court that whatever sentence is imposed him will not be a
10 sentence of extinction, that is, a sentence which would make
11 it impossible for him ever to have another chance at being
12 a useful member of society.

13 I would hope that that is true in terms of the
14 length of servitude which is to be imposed, and I hope it is
15 true with respect to whatever financial strictures your Honor
16 has in mind to include here.

17 It is my understanding -- and I state this with a
18 very serious apprehension of my own professional responsibil-
19 ity -- that the defendant is broken, that he has no money,
20 that there are no secret pockets in which money reposes, that
21 indeed he has great difficulty at this time in meeting the
22 ordinary expenses of existence, and any illusion that he is a
23 man of great wealth, who has managed to secrete it in some
24 foreign place, in my very careful and carefully expressed
25 judgment, is absurd.

2 So I ask your Honor in imposing sentence to simply
3 consider the points I have made.

4 THE COURT: All right.

5 Philip Stoller, you have every right under the law,
6 as you know, to speak to the Court directly, even though your
7 counsel has spoken for you.

8 DEFENDANT STOLLER: Yes, your Honor.

9 My counsel has spoken most adequately, in my opinion,
10 for me. Anything I add would be superfluous. However, I
11 would like to make one short statement.

12 On June 20, 1969, I voluntarily appeared before the
13 Securities & Exchange Commission, before Mr. Todd, I believe,
14 a Mr. Raschus and a Mr. Kelly. I told them in detail how
15 I had a pre-arrangement to purchase or re-purchase -- excuse
16 me -- five thousand shares of stock at a specific price of
17 8-1/4 from five specified individuals. I did not intend to
18 hide the fact at that time of any deletions of price that Mr.
19 Sorkin talked about before the jury later. That I am unaware
20 of. I told the truth as I knew it then.

21 I believed, and I still believe, your Honor, I was
22 not guilty of any infraction of SEC rules. I may be wrong,
23 but I did not believe then and I do not believe now, and at
24 that point my contact with Training-with-the-Pros in terms of
25 manipulation or these other terms, which as a lawyer I cannot

2 discuss, ceased.

3 The fact is, whatever my faults may be -- and they
4 are probably many -- I have never, never referred anyone to a
5 security I did not believe had a possibility, the speculative
6 possibility of appreciation.

7 I think Mr. Nyman himself said that quite directly.
8 I did not intend to defraud the public, mislead the public,
9 and certainly to mislead my friends. If I were guilty of
10 something, your Honor, I know ignorance of the law -- I may
11 have said it before -- is no excuse. I intended to lie to no
12 one, to mislead anyone or to steal from anyone, and I think,
13 your Honor, that is about all I can say except to thank you
14 for your indulgence and your fairness and kindness in this
15 entire affair.

16 Thank you, sir.

17 THE COURT: Well, Mr. Stoller, I share the view
18 with Mr. Gould that you are an extremely competent, articulate
19 person. I don't know you as well as your co-defendant, Martin
20 Frank, whom I have known for a great many years, and I know
21 how intelligent he is and how excellent a lawyer he can be
22 when he sticks to it.

23 The difficulty is that in this kind of a case the
24 evidence to me was rather overwhelming. The business, so far
25 as the evidence showed, of you and D'Onofrio and Allen, all

2 off this other crew, I am afraid that you have to understand
3 that the verdict was that of the jury, and I believe that the
4 jury was correct, as a practical matter.

5 Unfortunately, there is nothing that experience
6 teaches that will deter able people like you from this kind of
7 operation in the securities field except a sentence which is
8 designed not to rehabilitate you or people like you -- that
9 is impossible. There is no jail that is going to rehabilitate
10 Philip Stoller, or Philip Stoller doesn't need to be rehabili-
11 tated in, either way you want to put it. I am frank to say
12 that the purpose that the Court has in mind here is to punish
13 and to deter you and others similarly situated.

14 Those are the only reasonable and rational objectives
15 for sentencing in this particular case.

16 I do not want to be understood as singling you out
17 or your co-defendant out or anyone else who gets caught in one
18 of these situations. That would be wrong and counter-
19 productive if it weren't wrong. But I must also add that the
20 Court cannot be unaware of the fact that this was a raffish
21 crew as far as the evidence showed, and you were a card-
22 carrying, leading member thereof.

23 Now, the fact finders were persuaded to that effect,
24 and I see no reason to second-guess their collective judgment.
25 For all I know, it was probably wiser than any one of us could

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2 be.

3 So you are now some forty-five years old, and with
4 good fortune, which I hope you have, truly, you will have many
5 productive years or potentially productive years ahead of you.
6 Because of that and because of the fact that I do not want to
7 leave your family with the thought that they are going to be
8 devastated by your absence forever, somehow a sentence out
9 of all these conflicting considerations for and against you
10 must be fashioned.

11 This Court fashioned the sentence as follows:

12 In respect to Counts 1 to and including 10, this
13 Court sentences you on each count to the custody of the Attorney
14 General of the United States for a period of three years
15 and six months, said sentences to be served concurrently.

16 On each one of these counts, the Court imposes a
17 fine upon you of \$1,500. They are committed fines. I will
18 give you, however, one year from the date of this judgment
19 or the date of any final judgment of an appellate court which
20 affirms the conviction, whichever is longer, to pay these
21 fines.

22 In respect to Counts 14 and 16, the Court imposes
23 concurrent sentences on those two counts of nine months.
24 However, those concurrent sentences of nine months are to be
25 deemed consecutive to the sentence in Counts 1 through and

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2 10.

3 I assume, Mr. Stoller, that you intend to take an
4 appeal in this case; is that correct, sir?

5 DEFENDANT STOLLER: I believe so, your Honor. Yes,
6 sir.

7 THE COURT: Well, if a notice of appeal is filed,
8 I would say to you then that I would here and now stay, of
9 course, the implementation or execution of these sentences
10 until your appeal is disposed of.

11 DEFENDANT STOLLER: I appreciate that.

12 THE COURT: I also must advise you, thought, that
13 you have the intelligence and the ability of excellent counsel
14 advising you to tell you this, that you are entitled to appeal
15 as a poor person. If you haven't got funds, you will have to
16 fill out an appropriate affidavit in this Court, in which
17 event you can take your appeal at public cost, and you can
18 have counsel appointed for you at no cost to you, but at
19 public expense.

20 The procedure is that you will have to have an
21 order signed by this Court to the effect that you are without
22 sufficient funds to prosecute your appeal. Then, if you want
23 to have counsel appointed, you should make that motion in the
24 appellate court after the notice of motion is filed.

25 Mr. Gould, may I ask you or one of your associates

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2 to advise my chambers by telephone when the decision is finally
3 made as to whether or not an appeal is filed or to be filed,
4 so that I can process the appropriate papers to the appellate
5 court under existing rules.

6 MR. GOULD: I would ask your Honor, since it is
7 Friday afternoon, to give us until Monday morning.

8 THE COURT: Oh, surely. You have ten days, in any
9 event. I just want to know within that ten-day period, so that
10 I can --

11 MR. GOULD: Oh, your Honor will be advised on Monday
12 with respect to that. I assume that bail is continued.

13 THE COURT: Bail will be continued as previously
14 fixed.

15 MR. SORKIN: No objection from the Government, your
16 Honor.

17 THE COURT: All right.

18 THE CLERK: United States of America versus Martin
19 Frank, for sentencing.

20 THE COURT: Now, Mr. Sidney Feldshuh.

21 MR. FELDSHUM: Your Honor, may I have just a moment
22 to get ready, sir?

23 THE COURT: You may. As a matter of fact, I wanted
24 to say something to Mr. Gould.

25 Mr. Gould, may I say that there is no reason why,

2 unless the Government objects, you and your client need remain.
3 We are glad to have you, but --

4 MR. GOULD: No. I would like to leave, as a matter
5 of fact. I don't think I can make any contribution.

6 MR. SORKIN: I have no objection.

7 THE COURT: Good day.

8 Now, Mr. Feldshuh, you started to say what, sir?

9 MR. FELDSHUH: I just wanted a moment to get ready,
10 your Honor, and bring my papers up.

11 THE COURT: All right. While you are getting ready,
12 Mr. Feldshuh, keep in mind that though I was startled to re-
13 ceive your papers at late as twelve noon today, fortunately I
14 have had a chance to ready them.

15 MR. FELDSHUH: Yes, sir. I might say, your Honor,
16 pursuant to your Honor's statement at the trial, that we did
17 serve the notice of motion upon Mr. Sorkin on Tuesday, so he
18 had every item by which we were going to address the Court.

19 THE COURT: Well, he has already said that he is
20 ready to respond, so we don't need to argue that.

21 MR. FELDSHUH: Yes. We did give him notice prior to
22 today of what we were going to say upon the motion.

23 MR. SORKIN: Your Honor, that is absolutely true,
24 I will just interject, but the affidavit of Mr. Derfner, which
25 I think your Honor has before you, I did not receive until

2 about eleven-thirty this morning, which Mr. Derfner called
3 the supporting documents.

4 THE COURT: What is it you want to say, Mr. Feldshuh?

5 MR. FELDSHUH: Your Honor, I respectfully move, pur-
6 suant to Rule 29(c) --

7 THE COURT: Well, I don't think you have to repeat
8 your motions. They are here as a matter of record. But is
9 there anything you want to say which you have not mentioned
10 in your papers?

11 MR. FELDSHUH: Well, will it be deemed, your Honor,
12 that if I had spoken at length I would have repeated the
13 grounds that I made in my motion in writing? However, I do
14 wish to emphasize something which I believe to be most import-
15 ant.

16 THE COURT: All right, sir.

17 MR. FELDSHUH: And that is, under Rule 29(c), your
18 Honor, with regard to the acquittal by the jury of the sub-
19 stantive counts, I respectfully submit that under 29(c) the
20 verdict of guilty on the conspiracy count must be set aside and
21 a judgment of acquittal ordered.

22 The reason for this, your Honor, is that when you
23 look at Paragraph 5 of the first count, which is the means
24 paragraph, there set forth in the means paragraph are just a
25 few allegations referable to Mr. Frank.

2 Your Honor will recall that at the close of the
3 Government's case I made particular and emphatic reference
4 through the means paragraph, which starts at page 4.

5 In this paragraph, your Honor, the counts referable
6 to Mr. Frank are certainly few and far between. There was
7 Paragraph E on page 5 which indicated, which set forth that
8 Mr. Frank instructed somebody to do something referable to the
9 selection of nominees.

10 Then, the next count to which there is reference is
11 Paragraph O on page 8, and here, as far as Mr. Frank is con-
12 cerned, it is stated that he notarized some documents. Then
13 in Paragraph O, without mentioning Mr. Frank, is linked in
14 Paragraph P, which says that the purpose of the notarization
15 was to fool Emanuel Deetjen, whereas at a point in the memo-
16 randum of the Government on sentencing, we have a reference
17 there that the purpose of the notarization was to effect
18 nominees; all of a sudden this becomes part and parcel of a
19 scheme put forward, participated in by Mr. Frank to fool
20 Emanuel Deetjen, who in fact was not fooled.

21 With respect to Paragraph R, your Honor will recall
22 you dismissed Paragraph R. That was the alleged payment of
23 \$15,000. And in that connection, throughout this trial,
24 after that dismissal, and as pointed out in our motion papers,
25 we claimed there was prejudicial comment made by the Government

2 with respect to this \$15,000.

3 B 8 I do not --

4 THE COURT: I disagreed with you then about that,
5 and I still do.

6 MR. FELDSHUIJ: No question about that, your Honor.
7 Despite your Honor's caution and despite the dismissal.

8 Now, the only other place, your Honor, where there
9 is anything said about Mr. Frank in the means paragraph, Para-
10 graph 5, is that it was promised that there would be addition-
11 al moneys, and that was in Paragraph 9 -- on page 9.

12 Now, your Honor, all of these paragraphs, all of
13 these subdivisions of Paragraph 5 were incorporated specific-
14 ally in the substantive counts throughout, and, as a matter
15 of fact, the language of the incorporation by reference was
16 so specific -- and I refer your Honor to page 11, wherein it
17 appears the allegations contained in Paragraph 5 of Count 1
18 of this indictment are repeated and realleged as though fully
19 set forth herein, as though fully set forth herein, as to be
20 constituting and describing some of the means by which defend-
21 ants committed the offense charged in Paragraph 1 of this
22 count.

23 Now, that was incorporated in body as if the very
24 allegations contained in Paragraph 5 were restated in the
25 substantive counts. Your Honor knows that there was an

2 acquittal as to the substantive counts. As a matter of fact,
3 even more emphatic than that, your Honor, is your Honor's
4 charge to the jury in connection with the incorporation of
5 Paragraph 5.

6 THE COURT: Would you permit me to be --

7 MR. FELDSHUH: Certainly, sir.

8 THE COURT: I am sorry, sir. I am missing you.
9 Would you permit me to interrupt?

10 I wasn't aware of the hour, and I must get a message
11 off on another matter before five o'clock, and it is getting
12 close to five.

13 MR. FELDSHUH: Of course, your Honor. Certainly.

14 THE COURT: Would you bear with me?

15 MR. FELDSHUH: Yes, sir.

16 THE COURT: I will be right with you.

17 (Recess.)

18 MR. FELDSHUH: May I proceed, your Honor?

19 THE COURT: Yes.

20 MR. FELDSHUH: I respectfully request your Honor to
21 look at page 3577 of your Honor's charge, wherein your Honor
22 addressed yourself to the substantive counts of the indictment,
23 and therein your Honor commenced to say the following:

24 "In substance, it is for you to explain the theory
25 of the Government as against Frank in all of these sub-

2 substantive counts, not only the mail counts here in dis-
3 cussion but Counts 2 through 6."

4 You stated to the jury, your Honor, that the Govern-
5 ment's position is that Frank was an aider and abettor, and at
6 that point your Honor submitted to the jury the Federal stat-
7 ute that applies to aiders and abettors, in that you said that
8 he who aids, abets, counsels, commands, induces et cetera et
9 cetera is punishable as a principal.

10 THE COURT: I know what I said, Mr. Feldshuh, but
11 what is the bottom line? What is the point you are making?

12 MR. FELDSHUH: The point that I am making is that
13 your Honor went on and then referred to Paragraph 5 of Count
14 1 and said, "This is the way you tie Frank into these sub-
15 stantive counts, by looking at Paragraph 5, which are incor-
16 porated at length in the substantive counts."

17 Your Honor plainly said that, and I submit that if
18 your Honor will but read --

19 THE COURT: Well, assume that I said that -- I am
20 not admitting that I did; the record will speak for itself --
21 what is the point?

22 MR. FELDSHUH: The point is that, being found inno-
23 cent on the counts, the substantive counts, 2 through 10,
24 there was implicit in that finding a determination on the
25 facts in favor of the petitioner as to an essential count in

2 the conspiracy.

3 May I suggest this --

4 THE COURT: Not at all. I don't think that's right
5 at all. What the jury obviously did is, they obviously de-
6 cided that Frank may have given him some help and was in the
7 conspiracy to a limited extent, but he wasn't in on the fru-
8 ition thereof.

9 It seems to me a most logical determination.

10 MR. FELDSHUN: Except, your Honor, if Count 5 --
11 if Paragraph 5 is so indelibly marked in as your Honor said --

12 THE COURT: No, no. I am sorry. I don't agree with
13 that at all.

14 MR. FELDSHUN: Well, your Honor, with regard to --

15 THE COURT: Let's get to something else. That is
16 totally --

17 MR. FELDSHUN: May I just point out, your Honor,
18 that in Zane there is this exception where Judge Mansfield
19 plainly said that if the charge and if the facts in support
20 of that charge are such that they are favorable to Frank and
21 an essential part of a finding of guilt on the part of the
22 conspiracy count, that acquittal on the substantive counts
23 must bar a finding of guilty on --

24 THE COURT: I don't agree that that rule applies
25 here. Now, I don't want to hear any more about that. It is

2 so plain that we don't get down to that that I don't even want
3 to hear it. I would be wasting your time in telling you.

4 MR. FELDSHUIJ: All right, your Honor. Then, apart
5 from the matters which are set forth in the motion papers in
6 writing, I would like to dwell, your Honor, on this tape busi-
7 ness, and the reason why --

8 THE COURT: I excluded the tape. I don't understand
9 that point, either, and you are never going to -- having asked
10 the Court to exclude the tape, which the Court did --

11 MR. FELDSHUIJ: Of course, your Honor, but --

12 THE COURT: Your argument here borders on the
13 frivolous.

14 MR. FELDSHUIJ: Your Honor, it isn't that I am
15 directing your Honor to your Honor's exclusion of the tape.
16 I am saying that the evil of the tape went further than the
17 palliative of exclusion.

18 May I bring this out?

19 THE COURT: The jury never heard about it. I don't
20 understand how you can say that when the jury never heard it.

21 MR. FELDSHUIJ: It wasn't the fact that the jury
22 heard it. I say this taints the entire conduct of the prose-
23 cution.

24 THE COURT: Oh, for heaven's sake. That was a very
25 close question, and if I made an error in the case I would

2 think that was one of the likely areas where I erred.

3 MR. FELDSHUI: Your Honor, will you bear with me
4 for just one moment? I am not talking about your Honor's
5 exclusion. What I am talking about is the taking of this tape,
6 the very fact of the taking of this tape denied Frank due pro-
7 cess, because it precluded him from electing to go on the
8 stand, and I say that --

9 THE COURT: I don't follow that one.

10 MR. FELDSHUI: I beg your pardon?

11 THE COURT: I don't follow that one as being true
12 as far as --

13 MR. FELDSHUI: Let me explain it to you, sir, if I
14 may. As your Honor knows, a defendant has the right to elect
15 to go on the stand or not to go on the stand. Now, this is
16 what happened here:

17 The Government, through this very, very devious
18 method -- and I call it what it is -- did this: they obtained,
19 improperly and unlawfully, under Messiah, a recording in the
20 post-indictment -- Just let me finish, your Honor, please.

21 THE COURT: I know, but you keep repeating something
22 that I already know, and it is very unsettling.

23 MR. FELDSHUI: Except for one point. Frank's right
24 to take the stand was vitiated, his opportunity to take the
25 stand was vitiated by the conduct of the prosecution, because

2 -- and I'll tell you why: because --

3 THE COURT: You claim that they would have been
4 cross-examining him with the tape.

5 MR. FELDSHUH: Yes. Under Harris. And what --

6 THE COURT: Maybe yes, maybe no. That is not what
7 you say in your sentencing memorandum, by the way.

8 MR. FELDSHUH: Well, not in my sentencing. I have
9 not come to that.

10 THE COURT: No, but you make a statement, you say
11 that Frank decided not to take the stand, which is clearly his
12 right, for tactical reasons.

B 9 13 MR. FELDSHUH: I say that that, the aborting of
14 that right, was forced upon him by the improper and unlawful
15 tactics of the Government, and I submit that that is what
16 happened --

17 THE COURT: Well, you can't have your cake and eat
18 it, too, in this world, Mr. Feldshuh, even in the chancy
19 world of criminal justice as we practice that scheme in the
20 courts of the United States. I don't follow you. You moved
21 me to exclude that tape. I did.

22 MR. FELDSHUH: Right.

23 THE COURT: I am not sure I was right yet, but,
24 nevertheless, I did. Now, you can't turn around and, having
25 achieved that success, say that the Government did this simply

2 to create a position for Frank not to take the stand. I don't
3 buy it.

4 MR. FELDSHUIJ: May I just explain to you why I feel
5 this way?

6 THE COURT: Oh, I am sure you do, but I don't buy it.
7 It makes no sense.

8 MR. FELDSHUIJ: I say that the remedy is not mere ex-
9 clusion. The remedy is aborting these proceedings, because
10 that tape went further in its unlawful procurement.

11 THE COURT: I am sorry. I don't find myself per-
12 suaded by that at all.

13 MR. FELDSHUIJ: Very well, your Honor. I say that
14 this right to elect to go on the stand was frustrated. I say
15 that that was a violation of the Fifth Amendment, the due
16 process part of it, and I say that in this particular, in the
17 circumstances, it was as if by procuring that tape they re-
18 strained Frank from going on the stand. I say "they" -- that
19 is, the Government.

20 THE COURT: Well, I am sorry, but you don't persuade
21 me to that end, I tell you that.

22 MR. FELDSHUIJ: Well, your Honor, I respectfully sub-
23 mit it for your Honor's consideration, and, of course, I re-
24 spectfully differ with your Honor conclusion.

25 THE COURT: All right. Well, I am sorry, but I also

2 deny the other motions and grounds for motions which have been
3 set forth at great length in the papers, which, I might say,
4 Mr. Feldshuh, I am grateful for. That, really, probably was
5 the best thing to do in this case: lay it out all verbatim and
6 in writing. But a great many of those matters, as you know
7 and I know, were raised in the trial, if not virtually all of
8 them.

9 So I am not a complete stranger to the matters, and
10 I have thought about them, and since I have read your papers
11 earlier today, and I concluded that there is no merit to any
12 of the motions for judgment of acquittal or for a new trial,
13 they are respectfully denied.

14 Now we turn to the issue of sentence.

15 MR. FELDSHUCH: Yes, your Honor.

16 THE COURT: I think you and Mr. Frank should know
17 that I have received a very great number of letters from var-
18 ious professional, business and social acquaintances of Mr.
19 Frank. I have considered them along with the report, which
20 really does not say very much except the usual pedigree in-
21 formation. And, again, as I said with respect to Mr. Stoller
22 and Mr. Gould, I am not criticizing Mr. Frank or your office
23 for this. I am just making an observation that the report it-
24 self isn't very detailed.

25 However, I don't really see much trouble in that,

2 because I have known Mr. Frank as a lawyer for some time, num-
3 ber one; and, number two, I have known something about this
4 case, because I was there when the evidence was unfolded, and
5 that is what I think is really important here.

6 MR. FELDSHUN: Yes, your Honor.

7 I have also submitted to your Honor our concept with
8 regard to sentencing, too.

9 THE COURT: That's right. You have.

10 MR. FELDSHUN: And in that regard, your Honor, with-
11 out reviewing it in detail, may I respectfully state that in
12 the posture of Mr. Frank's situation, a professional, in his
13 community and in his family, and, of course, I must say, that
14 as my partner for upwards of thirteen years, I respectfully
15 submit to the Court that Mr. Frank, as a consequence of this
16 situation has been punished long since, from the first day.

17 From the point of view of this episode, being a
18 situation that has brought upon his family great, great, over-
19 whelming problems, I need not reiterate that.

20 THE COURT: Well, Mr. Feldshuh, I am sure of that.

21 MR. FELDSHUN: Both to his wife and his children.

22 However, with regard to the situation here, as your
23 Honor knows, not one dime of five thousand dollars ever went
24 into Mr. Frank's pocket.

25 THE COURT: Well, now, wait a minute, please. You

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2 may argue that, but you have got to be aware, and I am sure
3 you are, because of the way your memo is couched, you must be
4 aware that I at least listened to the tape.

5 MR. FELDSHUIH: Of course I am aware of it, your
6 Honor, and I say to you that having listened to that tape, as
7 I did, too, that this single remark to which your Honor refers
8 and which prompted your Honor to make a comment during the
9 course of a colloquy --

10 THE COURT: Well, we can't ignore it, Mr. Feldshuh.

11 MR. FELDSHUIH: No. I don't propose to ignore it,
12 your Honor, but I ask your Honor to take it in the context
13 of the whole discussion, whatever happened on that tape.

14 There was a situation where when you look at the
15 entire tape and you hear the entire tape you find that later
16 on down the road there is an express contradiction at that
17 point. It said so.

18 THE COURT: By Jerome Allen, a gentleman whom I also
19 think --

20 MR. FELDSHUIH: Your Honor is forgetting one point.
21 Frank says to Allen, they say that the pay-off, the \$15,000
22 was a pay-off. That is the lie. That is the lie. That is
23 in there, your Honor, very expressly. Then he goes on --

24 THE COURT: As you point out in your memorandum,
25 the key phrase that I am talking about is, "There is no

2 question in my mind". That is Mr. Frank speaking -- and I
3 know there is none in yours -- he is talking to Mr. Allen --
4 "that you paid me \$15,000 to tell you how to do the Training
5 deal. There is no question in my mind I had to tell you that
6 Ray and Jerry."

7 MR. FELDSHUM: But, your Honor, if your Honor reads
8 on further, you will see there is a total confusion there.
9 He is talking to Allen and he is addressing him as "You and
10 Jerry". This is a garbled situation, where he says later on,
11 "Don't lie."

12 THE COURT: I am aware of that, but somehow, some
13 way, for some purpose, your partner has conceded on that tape
14 that he got the \$15,000. Maybe not necessarily the way they,
15 meaning the Government, claim, but he got the \$15,000. Let
16 me perhaps put the issue to rest, because, frankly, although
17 I heard the tape, that is by no means the foundation stone on
18 which I am building my judgment or sentence, I can assure you.

19 MR. FELDSHUM: Your Honor, you, yourself --

20 THE COURT: There are other factors, such as the
21 jury's verdict and the other evidence as a whole, which I am
22 concerned about. I am not singling out or parsing out state-
23 ments on that tape. I want you and your client to know that.
24 I don't think it is necessary or desirable.

25 MR. FELDSHUM: You know, your Honor, yourself,

2 touched upon it many times in the robing room when your Honor
3 says that that was set up, he was set up on the occasion of
4 that tape. The very nature of Allen discourse was setting him
5 up.

6 THE COURT: It may well be, but whether I said it
7 or not, I am not the fact finder. I was discussing legal
8 points in the robing room. I wasn't making formal announcements
9 of findings of fact or anything of that nature. But, as I
10 say, Mr. Feldshuh, the case does not turn on that tape. I
11 quite agree with you if that is your point.

12 MR. FELDSHUM: I have every confidence that that is
13 so, your Honor.

14 THE COURT: Well, I hope you will accept that.

15 MR. FELDSHUM: And I so come to that conclusion
16 without a question and without reservation.

17 MR. FELDSHUM: Your Honor brought it up, and that is
18 why I discussed it.

19 THE COURT: Well, you mentioned it in your report,
20 which I don't blame you for, by the way, because you and I
21 heard of the tape, and we know that.

22 MR. FELDSHUM: That's right.

23 THE COURT: And I can appreciate your concern, or,
24 more importantly, that of your client, but I really feel on
25 balance that it would be irrational to say that this is the

2 be-all and end-all on the sentence. It isn't.

3 MR. FELDSHUH: Right.

4 Your Honor, please keep in mind, if you would, that
5 this is Mr. Frank's, I should say, roadblock in his career,
6 possibly his destruction and turning aside, apart from the im-
7 pact upon his livelihood, his children and his family. The
8 opprobrium of this case will live on long after time passes
9 and as long as Mr. Frank lives, no matter what your Honor says
10 or does.

11 THE COURT: Well, I have no doubt of it.

12 MR. FELDSHUH: And it is in that sense that I re-
13 spectfully request your Honor to, looking at the overall situ-
14 ation, to permit Mr. Frank to restore his life to the extent
15 that he can and to be with his family and to go on in his com-
16 munity and to learn by this lesson, this terrible lesson,
17 that there must be even a scintilla of a reputation.

18 In that respect, I respectfully request your kind
19 consideration, mercifully.

20 Thank you, your Honor.

21 THE COURT: All right, Mr. Frank.

22 Despite the fact that your counsel and long-time
23 partner and friend has spoken eloquently, you know that you
24 have the right to speak before sentence is imposed.

25 DEFENDANT FRANK: I would like to say something,

2 your Honor.

3 Your Honor, I stand before you in indeed a sense of
4 sadness and distress. For more than twenty years I have ac-
5 companied others before the sentencing judge, and I was there
6 to lay out their reasons and vital considerations to be known
7 to the Court in this most sensitive of moments.

8 I do this now not for others but for myself and in
9 my own behalf, a scene that is not strange to me.

10 Throughout this long trial, all those partaking in
11 it assiduously, my partners and my associates and others in my
12 office, gave full devotion to the cause. Now it is my turn,
13 with your permission, to address this Court.

14 I do state to your Honor with all the sincerity at
15 my command that I was not a party to a scheme or plan or the
16 conspiracy set out in Count 1. I know the jury in good faith
17 has determined otherwise, but I cannot leave the Court with
18 the impression and such finding accords with the knowledge of
19 what I did and what happened. I know that at this moment con-
20 trition and like comments are made, but I cannot at all bring
21 myself to the belief that I was part and parcel of a conspir-
22 acy alleged in the indictment. I am confident, however, that
23 your Honor will not be adversely swayed because I still assert
24 my innocence in this matter. Certainly, I have learned the
25 facts of Training-with-the-Pros. Such knowledge was given to

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2 me when I represented the company before the SEC, when I
3 represented the company in the administrative proceedings in
4 1969 and in 1970, by later communications to me in 1973 from
5 Mr. Stoller on the occasion of our representation in the 1001
6 case, and I learned further details from other defendants.
7 But this knowledge was not my knowledge. This was knowledge
8 I learned as an attorney.

9 I learned some knowledge of Training-with-the-Pros
10 from Jerome Allen, who, through those years, was a client of
11 the office and allegedly a friend of mine. I believe that
12 what Allen said in the affidavit was said to me was the truth,
13 and the request for Allen to execute the affidavit was not
14 made upon Allen surreptitiously, in a room in my office; it
15 was given to Eric Brigman.

16 As your Honor knows, I freely state that my special-
17 ty has been the practice of law in the securities field.
18 Because of matters which came across my desk, I dealt primarily
19 with that subject. Upon the advent of this entire episode,
20 going back to my disqualification as counsel for Stoller and
21 publicity given to that area, all of my work has largely dis-
22 appeared. My livelihood from that source, irrespective of
23 the fact that the Stock Market itself is suffering from econ-
24 omic distress, has practically disappeared.

25 As to my personal life, I cannot begin to state

2 without feelings the destruction that the adverse publicity
3 has caused both, not only myself but my family and particular-
4 ly my children, that the local newspapers pictured me as a
5 person who inflicted bodily harm on Jerome Allen as a result
6 of that obstruction of justice indictment, and my sixteen-
7 year-old son fought more battles in school in one week than
8 he did all of his life.

9 My daughter of twelve years of age was taunted by
10 her classmates, and my wife's appearance on the tennis courts
11 brought looks of amazement as if she was the wife of a paid
12 and hired killer.

13 Directors of the religious group with which I served
14 looked at me as if I was a person not worthy of being associ-
15 ated with after these reports came out. I don't need to dwell
16 on what has happened to my general business as an attorney,
17 the reluctance of clients to deal with somebody who has in-
18 curred the wrath of the Government, or the fear that the time-
19 honored expression, they'll look at you as if disfavor has
20 come about.

21 I stand here, your Honor, stripped of my profes-
22 sional standing as a securities specialist. I have been stripped
23 of my clients, and most assuredly, I believe that as a result
24 of my conviction I will be 2-E'd out of practice before the
25 Commission, and, possibly with the advent of the new rules

2 promulgated by the Second Department, probably the subject of
3 disbarment.

4 I don't know how or what other punishment this Court
5 could or should inflict upon me.

6 Thank you, your Honor.

7 THE COURT: Martin Frank, as you know, I have known
8 you as a lawyer for twelve years or more. I am frank to say
9 that I have always regarded you as an ambivalent figure in
10 this sense:

11 First, I don't know of any lawyer in this city or
12 elsewhere that knows more and is intellectually more capable,
13 let us say, in the field of securities law than you are. I am
14 quite serious about feeling tha way. I have felt it for many
15 years.

16 On the other hand, I have felt and I have seen signs
17 for many years that you were skating on the thin edge of dis-
18 aster. I never could figure out what it was motivated by,
19 whether it was greed or just an inclination to go over the
20 line and stray behind the duties and responsibilities of
21 ethical and honest counsel.

22 I have always hoped that those suspicions and sur-
23 mises of mine were without foundation. I have heard things
24 by gossip which I hoped were not true, but I am afraid that
25 this all has come home to roost.

2 I can't remember in the twelve years and three
3 thousand-odd people that I have sentenced where I have felt
4 more troubled than in your case, partly for the reasons I have
5 already indicated.

6 I have heard an argument for you, the other day, a
7 few weeks ago, in which frankly no more reputable counsel than
8 you were present; your argument was at least three-fold
9 better than theirs, and I thought about this day with heavy
10 heart, knowing how much respect I have for your talent when
11 you bring it to bear properly and ethically in legal matters.

12 There is no one I have greater respect for. But the
13 facts here were there for the jury to determine, and they did,
14 and in my judgment it was totally consistent and very careful,
15 indeed, of the jury to reject any arguments of the Government
16 to convict you on the substantive counts but still hold you on
17 the conspiracy count. It made a great deal of sense.

18 I am forced to say that the jury had ample evidence
19 to do it either way, but they chose to be constrained, and I
20 am content to be bound by that. It probably made good sense.

21 But here your involvement was deep. This was a
22 crew of piranhas of the worst sort. We know this, because
23 D'Onofrio and Allen testified, and we know just what the whole
24 wretched thing was about.

25 Now, my view is that when lawyers get into trouble,

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2 they should not be treated too much differently, if any dif-
3 ferently than others. I recognize that from time immemorial
4 judges and courts have differed about this approach. I have
5 been criticized for being excessively harsh upon lawyers on
6 whom I have imposed sentences in years past.

7 As I told Mr. Stoller, I tell you, there is no
8 prison that is needed to rehabilitate Martin Frank. If
9 Martin Frank needs rehabilitation, he will rehabilitate him-
10 self with the help of his family and his religion. I know
11 that; you know that. It would be monstrously absurd for you
12 or I or anyone else to think that prison is going to rehabili-
13 tate you or somebody else like you. Of course not.

14 On the other hand, as I told Mr. Stoller -- and I
15 think it is true here -- the only way this kind of conduct is
16 shown in the Training-with-the-Pros episode is going to be
17 nipped is to strike the note that people who get engaged in
18 this are going to be punished. Now, that can translate out,
19 depending on one's viewpoint of the matter as general and
20 specific deterrence. It also might be translated out as
21 punishment or retribution, to use the classic phrase.

22 Now, I am frank to say that I do not find it in my
23 hear to impose as great a sentence as I imposed upon Philip
24 Stoller, even though you like he are a first offender, even
25 though I think you were deeply involved in this, or, more

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2 accurately, the jury found that you were, and I cannot but ac-
3 cept the jury's verdict.

4 Therefore, I have fashioned the following sentence:

5 I sentence you to the custody of the Attorney Gener-
6 al of the United States for a period of two years, and I fine
7 you the sum of \$2,500, which is a committed fine.

8 Now, I understand, or, I believe I should say that
9 you intend to take an appeal; is that so?

10 DEFENDANT FRANK: That is correct, your Honor.

11 THE COURT: I will, of course, stay execution of
12 the sentence pending appeal and see what the appeal court
13 determines. I feel rather foolish in telling an experienced
14 and knowledgeable lawyer like you this, but the statute man-
15 dates that I do. If you don't have the funds to prosecute
16 your appeal, you can make application in the District Court
17 for an order permitting you to appeal as a poor person, and if
18 you have to have counsel appointed for you, I will thereafter
19 send you to the appellate court to actually make the appoint-
20 ment; since they should do that, in my judgment, for appellate
21 purposes.

22 I gather we can expect that a notice of appeal will
23 be filed.

24 MR. FELDSHUH: Yes, indeed. It shall. Very, very
25 quickly, too.

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2 THE COURT: Very well. I will make the necessary
3 report to the appellate court so that they can expect this
4 appeal to be prosecuted promptly.

5 MR. FELDSHUN: Yes, your Honor. It will be.

6 THE COURT: I will continue bail, and I assume Mr.
7 Sorkin on behalf of the Government has no objection to that.

8 MR. SORKIN: No objection, your Honor. We don't
9 object.

10 THE COURT: I am truly sorry, Mr. Frank. You have
11 far too many virtues as a lawyer, and probably as a person,
12 that I don't even know about, and, I mean it, whatever you may
13 think about me or anything else that has happened here, this-
14 was a very sad day, not just for you and your family.
15 Obviously, of course it is, but it is for others present, too,
16 including this representative of this Court.

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